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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LISA SHEPPARD,
Petitioner,

v.

MAURICE COOK, Captain, Chief of
the Texas Rangers,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the free speech clause of the First Amendment encompass a right to freedom of belief?

The parties to this appeal are set out in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lisa Sheppard respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 6, 1999, as revised on July 26, 1999.

OPINION BELOW

The July 26, 1999, opinion of the court of appeals, which is not reported, is set out at pp. 1a - 16a of the

Appendix. This opinion revised, in a manner which did not alter the underlying judgment, the opinion that had earlier been entered on July 6, 1999, which is reported at 179 F.3d 360 (5th Cir. 1999). The September 22, 1997 order of the District Court, which is not reported, is set out at p. 17a - 20a of the Appendix.

JURISDICTION

The original opinion of the Fifth Circuit Court of Appeals was entered on July 6, 1999, and revised on July 26, 1999. This Petition for Writ of Certiorari is filed within 90 days of the entry of that decision. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech . . . ."

Section 1 of the Fourteenth Amendment states in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Proceedings Below

In 1993 petitioner, Lisa Sheppard, applied for, and was denied, a position with the Texas Rangers, a formerly all-male division of the Texas Department of Public Safety. In 1995 Petitioner commenced this action in the District Court for the Southern District of Texas against several defendants, including Senior Ranger Captain Maurice Cook of the Texas Rangers. The complaint alleged, *inter alia*, that

petitioner's application was rejected at respondent Cook's behest because he believed petitioner was a "woman's libber." Petitioner asserted that her rejection violated the First Amendment to the United States Constitution. Federal jurisdiction existed under 42 U.S.C. §1331.

Respondent Cook filed a motion to dismiss and a motion for summary judgment on the basis of qualified immunity, which the district court denied. (6a).

On interlocutory appeal of the denial of qualified immunity, the Fifth Circuit directed dismissal on the merits of petitioner's First Amendment claim, holding that the Constitution permits a state to reject a job applicant on the basis of her "tacit, private belief." (2a).

Statement of the Facts

The Texas Rangers were organized and legally recognized in 1835. In 1935, Texas created the Department of Public Safety ("TDPS"), which combined the Texas Rangers with the Highway Patrol. The TDPS is in turn under the guidance of the Public Safety Commission ("PSC"), whose three members are appointed by the Governor of Texas; the PSC's duties include the formulation of plans and policies for the TDPS and the supervision of the TDPS. (2a - 3a) (footnote omitted).

As of 1993, the Texas Rangers had never selected a woman for membership. Following increased pressure from both inside and outside the Texas government, the PSC decided to hire female Rangers for the first time, a move which generated no small amount of controversy among the Rangers. (3a).[1]

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[1] In a 1994 speech, Commissioner Ron Krist described the attitude of the Texas Rangers concerning women joining the force:

> The move that caused enormous controversy was the appointment of two female Rangers (and, whatever you do, don't call them "Rangerettes"). I remember how that came about. . . . I got all of those guys on a private plane to go to a Ranger retirement party and I said,

Sheppard joined the DPS as a commissioned officer in 1983 and made known her desire to become a Ranger someday. According to TDPS policy, an applicant to the Rangers must have served eight years with the TDPS (or its equivalent). (3a). At the end of the eight years, the applicant then must take a written exam. If the applicant's score on the written exam is high enough, he or she will be presented to an oral review board. Each member of the review committee scores the applicant on a scale of 0-500, with the top overall scorers becoming Texas Rangers. (3a) (footnote omitted).

By 1992, Sheppard had the requisite eight years of experience, and she took the written exam for the Rangers; her score was high enough to allow her to proceed to the oral interview. "Sheppard elected not to proceed through the interview process in 1991, however, after advice from several Rangers that it was not yet time for a woman to join the Rangers." (3a). Instead, Sheppard accepted a promotion to the rank of Criminal Investigator, believing that a year's experience in that position would help her when she re-applied for the Rangers the following year. No woman was made a Ranger in 1992. (3a - 4a) (footnotes omitted).

In 1993 Sheppard again took the Rangers' written exam. This time, her score was among the highest of the individuals taking the exam, and she again qualified for review by the committee. "After this second exam, a number of individuals, including Ranger Lieutenant Ray Cano ("Cano"), told Sheppard that she was not only the most qualified female applicant, but one of the most qualified applicants applying for a Ranger position in 1993." (4a). In

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> "Guys, I've got to visit with you about something. I think the time has come, after 150 years, that we have female Rangers." That was a real tense moment. I thought those guys were going to beat the hell out of me. But lo and behold, we did get female Rangers -- with no small measure of controversy.

Doc. 130, Ex.4.

addition, the Ranger assigned to investigate Sheppard's background found her to be qualified to become a Ranger. (4a).

In June 1993, Sheppard appeared before the oral interview board. Cook, the Senior Ranger Captain, chaired the six-member interview committee. The day before Sheppard's interview, another woman, Cheryl Steadman appeared before the board; following Steadman's interview, and in direct contravention of Rangers' policy, respondent Cook insisted on reviewing the scores that Steadman had received from Cano and another committee member, Ranger Lieutenant Earl Pearson. He made numerous remarks, both disparaging and laudatory, about the various candidates, and he eventually told Cano and Pearson to change their scores because he wanted Steadman and another woman, Marrie Garcia, to be selected as Rangers. (4a) (footnotes omitted). "Cano protested Cook's action to the extent that he suggested that Sheppard would make the best candidate of the women being discussed. Cook responded to Cano by saying that 'we're not going to promote Lisa ... [because] Lisa's too independent and she's too opinionated.'" (4a – 5a). As a result of respondent Cook's pressure, both Cano and Pearson, knowing that they were violating procedure, changed the scores for Steadman so that she would be selected instead of Sheppard. (5a).

"At Sheppard's interview the next day, some members of the committee, including Pearson, treated her with veiled contempt." (5a) She later discovered that Cano had given her the highest score of any member of the committee (465 out of a possible 500 points); another member gave her her lowest score (250), while respondent Cook gave her the second-lowest score (275). Because Sheppard's average interview score was lower than that of nine other applicants, she was not offered a position with the Rangers. Colonel James Wilson, the head of the TDPS, ratified the decisions made by respondent Cook and the

committee without having any direct knowledge of why Sheppard was not selected. (5a).

Sheppard contended that her low score and rejection were caused by respondent Cook, who was motivated by his hostility because of her political beliefs. In support of this allegation, Sheppard offered evidence of another remark by respondent Cook that ". . .Sheppard was black-balled because she was a 'woman's libber. Bruce Casteel, the Senior Ranger Captain who replaced Cook, and Ron Stewart, another Ranger officer, both testified in deposition that Cook made this remark." (5a) (footnote omitted).

There was no dispute in the courts below that Sheppard believes in the equality of women, ". . . and the fact that she was one of the first women to apply to the Texas Rangers suggests that she does believe that women can and should serve in historically-male positions." (6a).

Respondent Cook knew of petitioner's "woman's libber" views "because of her comportment or for other reasons" (10a), and denounced her because she "was seeking to change 150 years of chauvinism." (14a - 15a, n. 12).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER INCONSISTENT WITH THE DECISIONS OF THIS COURT

The decision below addresses a question of over-arching importance in constitutional law--whether the guarantee of freedom of speech contained in the First Amendment, and made applicable to the states by the Fourteenth Amendment, encompasses a right to freedom of belief. The Fifth Circuit held that there is no such right, and that the First Amendment protects only "speech activities," expressions of views or association with organizations. The

holding of the court of appeals is clear, forthright, and closely reasoned, but utterly inconsistent with 50 years of decisions by this Court.

The circumstances of this case pose this question with crystalline clarity. Petitioner alleged that she was denied promotion to the position of Texas Ranger because of her political views. She offered probative evidence that respondent, then the head of the Rangers, explained that he had "blackballed" her application because, in respondent's words, petitioner was a "woman's libber." The method by which this violation was perpetrated was particularly egregious; respondent directed his subordinates to inflate the scores of other applicants so that petitioner would not be selected. The court of appeals had no doubt that all of this had indeed occurred. "[T]he evidence is overwhelming that Cook acted unreasonably in deliberately rigging the selection process. Cook even willingly admits that he made the offensive statements at issue." (14a).

In the court of appeals the Attorney General of Texas, who represented respondent, candidly argued that it was constitutionally permissible for the State to discriminate against a job applicant because of her "private views," in this case petitioner's belief that women and men should be treated equally. Rejection of petitioner's application to the Rangers because she was a "woman's libber" was permissible, the State insisted, so long as state officials learned of petitioner's feminist beliefs, "not because of anything Sheppard ever said, or because of any groups to which she belonged, but because of her comportment or for other non-speech reasons." (10a).

The Fifth Circuit endorsed this interpretation of the First Amendment. A free speech claim, it held, required proof that a plaintiff had engaged in "speech activities."[2] The

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[2] "Another aspect of the test,...which is central to the case at bar, is that the plaintiff actually spoke or otherwise engaged in speech activities...." (10a).

speech activities to which constitutional protection is limited, according to the court of appeals, are espousing specific opinions or joining organizations that themselves endorse particular views.[3] The court below held that the fatal defect of petitioner's claim was that she had been denied a position in the Rangers solely because of her "private beliefs."

> Sheppard presented inadequate proof...that she engaged in speech or other activities entitled to protection under the First Amendment. (15a).
>
> Sheppard cannot point to a single event or association, which might have led Cook or other members of the Rangers to associate her with feminist organizations, and it is on that ground that her claim ultimately founders. (13a - 14a, n. 11).

In the court's view there was no need to decide whether the subject matter of petitioner's feminist beliefs involved a matter of public concern, "because of the lack of record evidence that Sheppard expressed her views on this issue one way or the other." (13a). Thus, it held, "even though Cook

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"Where a government employee has engaged in speech--either verbally or through...an association--we...must balance an employee's First Amendment rights with the employer's right to loyal and efficient service." (12a).

"The record below does not show...that Sheppard ever engaged in any free speech activity of either a public or private nature..." (6a).

"Sheppard ... concedes that she never verbally expressed [feminist] views to Cook." (2a).

"Sheppard never produced any evidence showing an outward sign of her membership in a feminist organization." (13a).

"By never saying *anything*, Sheppard may only rely on the Supreme Court's political association jurisprudence to anchor her First Amendment claim." (13a) (emphasis in original).

[3] "Where a government employee has engaged in speech -- either verbally or through such an association--" (12a).

considered those beliefs when he worked to ensure that Sheppard would not be hired" (2a), no constitutional rights were involved. Mere "tacit, private beliefs," according to the Fifth Circuit, are simply outside the protections of the First Amendment. (2a).

The decisions of this Court, however, are precisely to the contrary. Protection of individual beliefs on political matters, this Court has repeatedly held, lie at the very core of the First Amendment. The fact that an individual may have chosen to keep his or her views largely private, acting on them in his or her daily life while avoiding the spotlight of public speeches and organizations, often makes the degree of constitutional protection even greater. In striking down governmental action as violative of the First Amendment, this Court has repeatedly explained that the fatal flaw in question was that it interfered with freedom of belief.

Freedom of belief was the central principle underlying this Court's decision in *Board of Education v. Barnette*, 319 U.S. 624 (1943). The public school students there successfully argued that requiring them to recite the pledge of allegiance violated their "right of self-determination in matters that touch individual opinion and personal attitude." 319 U.S. at 631. This Court invalidated that requirement because it interfered with the freedom of belief guaranteed by the First Amendment.

> If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our

> Constitution to reserve from all official control.

319 U.S. at 642.

During the Cold War, this Court repeatedly relied on the freedom of belief in striking down state restrictions aimed at individuals suspected of harboring left-wing ideas. The decision in *Kent v. Dulles*, 357 U.S. 116 (1958), in order to avoid serious constitutional problems that would otherwise have been presented, held that federal law did not authorize the Secretary of State to require passport applicants to provide information about their views. This Court later explained that "*Kent* involved denials of passports solely on the basis of political beliefs entitled to First Amendment protection." *Haig v. Agee*, 453 U.S. 280, 304 (1981). The Court invoked the freedom of belief in *Gibson v. Florida Legislative Committee*, 372 U.S. 539, 570 (1963), where it held that the First Amendment precluded a state legislature from demanding to know whether certain suspected Communists belonged to the local NAACP. "The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief."[4] *Baird v. Arizona*, 401 U.S. 1 (1971), held that Arizona could not ask a bar applicant if she had been a member of the Communist Party, because the state could not demand information about a man's views" "solely for the purpose of withholding a right or benefit because of what he believes." 401 U.S. at 7.[5]

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[4] *See* 372 U.S. at 570 (Douglas, J., concurring) ("There is no other course consistent with the Free Society envisioned by the First Amendment. For the views a citizen entertains, the beliefs he harbors, . . . the ideology he embraces . . . are no concern of government.")

[5] *See* 401 U.S. at 6 ("The First Amendmen[t] . . . prohibits a State from excluding a person from a profession . . . solely because . . . he holds certain beliefs"), 8 ("Views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law"), 10 (Steward, J., concurring) ("the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs.")

Freedom of belief has been the linchpin of this Court's political patronage cases. In *Elrod v. Burns*, 427 U.S. 347 (1976), the plurality reasoned: "The cost of the practice of patronage is the restraint it places on the freedoms of belief and association . . . [F]reedom of belief is central . . . [T]he threat of dismissal for failure to provide support [to the party in power] unquestionably inhibits protected belief." 427 U.S. at 355-59.[6] *Branti v. Finkel*, 445 U.S. 507, 515 (1980), insisted that [i]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), extended these principles to the denial of a promotion because of an individual's beliefs, the very fact pattern in the instant case. "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe . . . ." 497 U.S. at 76. Only three years ago Justice Kennedy, writing for the Court, reiterated that "[a]bsent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs . . . ." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996).

In *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994), a state agency had reprimanded an attorney on the ground, *inter alia*, that "she believes" that she is not subject

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[6] 427 U.S. at 356 ("political belief and association constitute the core of those activities protected by the First Amendment"), 363 (means chosen by government to achieve an end must be the "least restrictive of freedom of belief"), 372 ("We require only that the rights of every citizen to believe as he will . . . be free . . ."), 375 (Stewart, J., concurring) ("The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot.")

to the jurisdiction of the agency. 512 U.S. at 143. This Court dismissed that proposed justification as "entirely insubstantial," explaining that "what she 'believes' regarding the reach of the board's authority is not sanctionable. *See Baird v. State Bar of Ariz[ona]...*" 512 U.S. at 143-44. In *Dawson v. Delaware*, 503 U.S. 159 (1992), the state had obtained a capital sentence by relying on evidence that the defendant belonged to a "white racist" gang; it defended a sentence so imposed with the argument that such racism "constitute[s] a portion of Dawson's character." 503 U.S. at 167. This court held that "Dawson's First Amendment rights were violated . . . because the evidence proved nothing more than Dawson's abstract beliefs." *Id.* The fact that the beliefs in question might be "morally reprehensible" did not make them a constitutionally permissible basis for sentencing Dawson to death. *Id.*

Although the decisions in these cases have not always been unanimous, even the dissenters have often stressed that any sanction based on, or interference with, an individual's beliefs poses serious constitutional problems. Thus, in *Baird v. Arizona*, 401 U.S. 1, 10 (1971) (dissenting opinion), Justice White emphasized that "Arizona has no intention of barring applicants based on belief alone," and Justice Blackmun stressed that in his view "[t]his. . . is not at all a case involving mere personal beliefs on the part of Sara Baird." 401 U.S. at 11 (dissenting opinion).[7] In *Branti v. Finkel*, 445 U.S. 508, 521* (1980) (dissenting opinion), Justice Powell premised his dissent on the insistence that the case "does not involve 'private political beliefs,' but public affiliation with a political party." In *Elrod v. Burns*, 427 U.S. 347, 381 (1976) (dissenting opinion), Justice Powell agreed that in general "government employment ordinarily should

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[7] 401 U.S. at 17 ("a realistic reading of the question discloses that it is directed not at mere belief but at advocacy and at the call to violent action").

not be conditioned upon one's political beliefs." In *Williams v. Rhodes*, 393 U.S. 23, 51 (1969) (dissenting opinion), although maintaining that the electoral system there at issue was constitutional, Justice Stewart acknowledged that "[a] state may not . . . adopt a system that discriminates on grounds of . . . political belief."

The principle that freedom of belief is protected from state action has been recognized in a wide variety of other circumstances. *Denver Area Ed. Telecommunications Consortium Inc. v. FCC*, 518 U.S. 727, 783 (1996) (Kennedy, J., concurring and dissenting) ("Each person should decide for himself or herself the ideas and beliefs deserving of . . . adherence") (*quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)); *Lowe v. SEC*, 472 U.S. 181, 232 n. 10 (1985) (White, J., concurring) ("denial of a license on the basis of the applicant's beliefs . . . could constitute a First Amendment violation"); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 97 (1980) (Powell, J., concurring) ("Restrictions on property use, like other state laws, are invalid if they infringe the freedom of expression and belief protected by the First and Fourteenth Amendments"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 155-56 (1973) (Douglas, J., concurring) ("Beliefs . . . are protected by the First Amendment against governmental ban or control"); *Beilan v. Board of Education*, 357 U.S. 399, 405 (1958) ("By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association"); *Watkins v. United States*, 354 U.S. 178, 188 (1957) ("The Bill of Rights is applicable to [congressional] investigations as to all forms of government action. . . . Nor can the First Amendment freedoms of speech . . . or political belief or association be abridged.").

Opinions of this Court and of individual justices have stressed the unusual importance of according constitutional protection to freedom of belief.

> [A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. . . . And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections. . . .

Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 (1977). Justice Frankfurter admonished that government restrictions based on

> men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization. The cardinal faith of our civilization is the inviolate character of the individual. A man can be regarded as an individual and not as a function of the state only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person.

American Communications Assn v. Douds, 339 U.S. 382, 421 (1950) (dissenting opinion). *Baird v. Arizona*, 401 U.S. 1 (1971), insisted that the freedom of belief guaranteed by the free speech clause is as sacrosanct as the freedom of religious belief.

> [T]he . . . guarantee of freedom of religion . . . embraces two concepts--freedom to believe and freedom to act. The first is absolute . . . "This conjunction of liberties is not peculiar to religious activity . . . . The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas v. Collins*,

> 323 U.S. 516, 531 (1945). . . . . "The First Amendment's ban against Congress 'abridging' freedom of speech . . . create[s] a preserve where the views of the individual are made inviolate."

401 U.S. at 5-6.

In some instances this Court has upheld government action which interfered with freedom of belief, but in doing so the Court has expressly recognized that an important constitutional right was at issue, and that limitations on freedom of belief could be upheld only under the most extraordinary of circumstances. *American Communications Assn v. Douds*, 339 U.S. 382 (1950), upheld the exclusion from union positions of individuals who "believe in . . . the overthrow of the United States Government by force." 339 U.S. at 386. In doing so the Court acknowledged that "[b]eliefs are inviolate", 339 U.S. at 393, and stressed that "the effect of the statute in proscribing beliefs--like its effect in restraining speech or freedom of association--must be carefully weighed by the courts in determining whether the balance struck by Congress comports with the dictates of the Constitution." 339 U.S. at 409. In *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971), the plaintiffs challenged a bar application question which inquired "Do you believe in the principles underlying the form of government of the United States of America?" 401 U.S. at 164 n. 18. The Court emphasized that on its face the question raised grave constitutional issues, because it seemed to inquire into and threaten sanction for "political beliefs," and upheld it only because the state stipulated that an applicant needed to do no more than express a willingness to take an oath to defend the Constitution. 401 U.S. at 162-65.

The central holding of the Fifth Circuit in the instant case is that freedom of belief is fundamentally different from freedom of expression and association, and that only the latter freedoms are protected by the First Amendment. This

Court has repeatedly refused to distinguish in this way among these inter-related liberties. Thus in *Branti v. Finkel* the Court held that "[i]f the First Amendment protects a public employee from discharge based on what he has said, it must *also* protect him from discharge based on what he believes." 445 U.S. at 515 (emphasis added). "Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs *or* prescribed expression." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) (emphasis added). "[T]hough freedom of belief is central, '[t]he First Amendment protects political association as well as political expression.'" *Elrod v. Burns*, 417 U.S. 347, 356-57 (1976) (plurality opinion) (*quoting Buckley v. Valeo*). Indeed, several decisions treat freedom of expression or association as but a corollary of a more fundamental freedom of belief. "We begin with the proposition that the freedom of thought protected by the First Amendment against state action *includes* . . . the right to speak freely . . . . The right to speak and the right to refrain from speaking are complementary components of the *broader* concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). "The right of freedom of thought . . . as guaranteed by the Constitution against state action *includes* the right to speak freely . . . ." *Board of Education v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (emphasis added).

The Fifth Circuit insisted that petitioner's beliefs were particularly undeserving of constitutional protection because they were only "tacit, private beliefs." (2a). This quite literally stands on its head the constitutional principles which this Court has held are embodied in the First Amendment. Many, if not most, of the First Amendment decisions of this Court regarding actions taken during the McCarthy era involved government intrusions on "private beliefs and views." *Re Stolar*, 401. U.S. 23, 25 (1971) (plurality opinion). Private beliefs are fully entitled to constitutional

protection, and an individual's decision to keep his or her beliefs private is itself entitled to that protection. In *Elrod v. Burns* the Court held that, absent special justification, the First Amendment forbade "a dismissal based solely on an employee's private political beliefs." 445 U.S. at 512 n. 5; *see* 445 U.S. at 517 (dismissal based on "private political beliefs" permitted only for certain policymaking and confidential employees). *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), stressed that "privacy of association and belief [is] guaranteed by the First Amendment." *See* 424 U.S. at 66 (warning of the risk of "invasion of privacy of belief"). This Court reiterated the protection accorded in *Buckley* to privacy of belief in *Nixon v. Administrator of General Services*, 433 U.S. 425, 466 (1977). *See Doe v. McMillan*, 412 U.S. 306, 327 (1973) (Douglas, J., concurring) ("One's conscience and thoughts are matters of privacy as is the whole array of one's beliefs or values.")

The decision of the court of appeals has created an impossible dilemma for the tens of thousands of government employees who work in the three states comprising the Fifth Circuit. Any one of them can today be dismissed or denied promotions for adhering to any political or social belief with which his or her supervisor disagrees. The danger is not limited to female workers thought to be "women's libbers", to African Americans regarded as "uppity", or to Mexican Americans perceived to "not know their place." Dismissal, or other forms of discrimination, are now permissible whenever a supervisor disagrees with a worker's opinions about any issue, be it gun control, capital punishment, abortion, gay rights, or presidential politics.

Under the Fifth Circuit decision, government workers who hold possibly unpopular views--and that, potentially, is virtually all employees--can only protect themselves from reprisals by visibly engaging in what the court of appeals categorized as "speech activities." Thus, a woman in petitioner's position would need to take steps such as joining the National Organization for Women, or writing to the

Houston Chronicle protesting the lack of women in the Texas Rangers, or organizing female law enforcement officers in Texas to object to the Rangers' practices, in order for her belief in gender equality to be protected. An African-American who feared he was not seen as sufficiently deferential to whites would need to take a precaution such as joining the NAACP.

But even these acts of expression or affiliation would, under the Fifth Circuit's decision, be insufficient. Government employees could only fall within the limited constitutional protection set out in the decision below if they assured that their supervisors were specifically told about their "speech activities." Dismissed workers could not prove that they were dismissed because of their speech activities unless the responsible supervisor actually had knowledge of those activities. Thus, a female applicant to the Texas Rangers who took the precaution of joining NOW would also have to make sure that any supervisor who might be involved in the decisionmaking process was specifically told of her membership in that organization. A mere verbal notification would entail considerable risk, since the responsible official could simply deny that the disclosure was made, forcing the victim to stake her lawsuit on the outcome of a "he said, she said" swearing contest. Under the Fifth Circuit's decision, the most prudent action would be for government employees to provide their supervisors with written statements setting forth their views on all potentially controversial political and social issues and listing all the organizations to which they belonged.

The course of action now required in the Fifth Circuit to secure protection of unpopular beliefs would, in the real world, be a prescription for employment disaster. Intolerant supervisors who in the past merely suspected that one of their subordinates believed in women's rights or gun control, or supported a particular political candidate would now know with absolute certainty what that worker's views were. Disclosure will be particularly important, but also especially

dangerous, for employees who hold views that they well know their bosses abhor.

Many at-risk employees will understandably balk at taking the precautionary measures required by the decision of the Fifth Circuit. Most workers want jobs, not lawsuits. Increased risk of dismissal, harassment or relegation to a dead-end job will often be far too high a price to pay to increase the likelihood of success in some possibly hypothetical litigation. If the allegations in the instant complaint were credited, a woman in the Texas Rangers who told management that she had joined some feminist organization would likely be haunted by that revelation for the rest of her career.

The peculiar irony of the Fifth Circuit decision is that the precautionary step which it now requires--disclosure to one's supervisors of all controversial views and organizations--is precisely the sort of intrusion into private opinions and activities which this Court has repeatedly held that a state cannot require. *See, e.g. Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963); *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1958). Thus, while Texas could not possibly compel its African-American employees to disclose their membership in the NAACP, the Fifth Circuit in effect has now required precisely that sort of disclosure if a minority worker wants constitutional protection against dismissal for holding egalitarian beliefs.

The loophole in constitutional protection that has been created by the Fifth Circuit is particularly serious because the lack of protection is not tied to any compelling or even arguable governmental interest in not hiring or promoting workers who hold particular beliefs. Because in the Fifth Circuit today *all* beliefs fall outside the scope of the First Amendment, dismissals and other reprisals are permissible even though the state admits that it has no significant interest in discriminating against the worker in question. In the instant case, for example, Texas

understandably has never asserted that women like petitioner who favor gender equality would be incompetent law enforcement officers.

The specific circumstances of this case provide a stark illustration of the reach and gravity of the Fifth Circuit decision. For half a century this Court has grappled with the question of whether state action could be taken against an individual because he or she refused to support the Constitution and laws of the United States, only rarely holding that such action was permissible. Here, however, the belief to which respondent Cook took such exception was petitioner's conviction that women should be accorded the same rights and treatment as men, a doctrine embodied in the Fourteenth Amendment to the United States Constitution and in countless federal statutes. Never until the Fifth Circuit decision below has it been thought conceivable that the First Amendment would permit a state to deny an individual a job because she *supported* the Constitution and laws of the United States.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 97-20862

Cheryl STEADMAN; et al., Plaintiffs,
Lisa Sheppard, Plaintiff-Appellee,

Versus

The TEXAS RANGERS; et al., Defendants,
Maurice Cook, Captain, Chief of the Texas Rangers,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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Before POLITZ, EMILIO M. GARZA and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

This case presents us with an intriguing question at the intersection of semantics and constitutional law. We must determine whether the First Amendment rights of a female applicant to the Texas Rangers ("Rangers") were violated by Maurice Cook, the Chief of the Rangers ("Cook"), and, if so,

whether Cook is entitled to qualified immunity. The twist to this case is that the applicant, Lisa Sheppard ("Sheppard"), while seeking to shoehorn supposed feminist beliefs into the constitutionally-protected rubric of political speech, concedes that she never verbally expressed these beliefs to Cook. Cook would have us hold, therefore, that he violated no First Amendment rights and that, even if he did, his actions should be shielded by the doctrine of qualified immunity. The district court found genuine issues of material fact to exist and allowed the case to proceed past summary judgment. The court also found that Cook's violation of Sheppard's constitutional rights was not entitled to the protection of qualified immunity. After the most searching review, however, we disagree with the district court that Sheppard's views constitute something more than tacit, private beliefs. Ironically, even though Cook considered those beliefs when he worked to ensure that Sheppard would not be hired, we need not reach the question whether he is entitled to qualified immunity because we hold that he did not violate any of Sheppard's established rights. We therefore reverse the judgment of the district court and render judgment for Cook.

BACKGROUND

I. *Facts*

The Texas Rangers were organized and legally recognized in 1835. During the first one hundred years of their existence, they were eulogized as the white knights of the American Southwest.[1] In 1935, Texas created the Department of Public Safety ("TDPS"), which combined the Texas Rangers

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[1] At least one historian of the Rangers characterized them as "mounted soldier[s] ... with no counterpart[s] in any age or country ... Chivalrous, bold and impetuous in action, [they are] yet wary and calculating, always impatient of restraint, and sometimes unscrupulous and unmerciful." WALTER PRESCOTT WEBB, THE TEXAS RANGER 1 (1935).

with the Highway Patrol. The TDPS is in turn under the guidance of the Public Safety Commission ("PSC"), whose three members are appointed by the Governor of Texas; the PSC's duties include the formulation of plans and policies for the TDPS and the supervision of the TDPS.

As of 1993, the Texas Rangers had never selected a woman for membership. Following increased pressure from both inside the Texas government and without, the PSC decided to hire female Rangers for the first time, a move which generated no small amount of controversy among the Rangers.

Sheppard joined the TDPS as a commissioned officer in 1983 and made known her desire to become a Ranger someday. According to TDPS policy, an applicant to the Rangers must have served eight years in the TDPS (or its equivalent). At the end of that probationary period, the applicant must take a written exam. If the applicant's score on the written exam is high enough, he or she will be presented to an oral review board. Each member of the review committee scores the applicant on a scale of 0-500, with the top overall scorers becoming Texas Rangers.[2]

By 1992, Sheppard had served her probationary period, and she took the written exam for the Rangers; her score was high enough to allow her to proceed to the oral interview.[3] Sheppard elected not to proceed through the interview process in 1992, however, after advice from several Rangers that it was not yet time for a woman to join the Rangers. Instead, Sheppard accepted a promotion to the rank of

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2 This policy also required the highest and lowest score to be dropped, and the remaining scores to be averaged.

3 Sheppard took the Criminal Intelligence Service written exam simultaneously and proceeded to that oral review board as well; she was selected by that committee to assume the position of Criminal Investigator.

Criminal Investigator, believing that a year's experience in that position would help her when she re-applied for the Rangers the following year. No woman was made a Ranger in 1992.

In 1993, Sheppard again took the Rangers' written exam. This time, her score was among the highest of the individuals taking the exam, and she again qualified for review by the committee. After this second test, a number of individuals, including Ranger Lieutenant Ray Cano ("Cano") told Sheppard that she was not only the most qualified female applicant, but one of the most qualified of all applicants for a Ranger position in 1993. In addition, the Ranger assigned to investigate Sheppard's background found her qualified to become a Ranger.

In June 1993, Sheppard appeared before the oral interview board.[4] Cook, the Senior Ranger Captain, chaired the six-member interview committee. The day before Sheppard's interview, another woman, Cheryl Steadman ("Steadman") appeared before the board; following Steadman's interview, and in direct contravention of Rangers' policy, Cook insisted on reviewing the scores that Steadman had received from Cano and another committee member, Ranger Lieutenant Earl Pearson. He made numerous remarks, both disparaging and laudatory, about the various candidates, and he eventually told Cano and Pearson to change their scores because he wanted Steadman and another woman, Marrie Garcia, to be selected as Rangers.[5] Cano protested Cook's action to the

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[4] The internal rules for reviewing candidates required committee members not to discuss the candidates after each had appeared before the board. In addition, no committee member was to review how any other committee member had scored the candidates.

[5] Cook also informed the other officers that he only wanted to promote two women.

extent that he suggested that Sheppard would make the best candidate of the women being discussed. Cook responded to Cano by saying that "we're not going to promote Lisa ... [because] Lisa's too independent and she's too opinionated." As a result of Cook's pressure, both Cano and Pearson, knowing that they were violating procedure, changed the scores for Steadman so that she would be selected instead of Sheppard.

At Sheppard's interview the next day, some members of the committee, including Pearson, treated her with veiled contempt. Nonetheless, Sheppard was surprised to learn later that she had been an unsuccessful candidate for transfer to the Rangers; Steadman and Garcia were selected. She later discovered that Cano had given her the highest score of any member of the committee (465 out of a possible 500 points); another member gave her her lowest score (250), while Cook gave her the second-lowest score (275). Because Sheppard's average interview score was lower than that of nine other applicants, she was not offered a position with the Rangers. Colonel James Wilson, the head of the TDPS, ratified the decisions made by Cook and the committee without having any direct knowledge of why Sheppard was not selected.

Sheppard contends that her low average score was due to retaliation by Cook motivated by his hostility toward her for her protected free speech activities, including her political beliefs, expressions, and associations. In support of this allegation, Sheppard adverts to another remark by Cook, not made during the selection process, that Sheppard was black-balled because she was a "woman's libber." Bruce Casteel, the Senior Ranger Captain who replaced Cook, and Ron Stewart, another Ranger officer, both testified in deposition that Cook made this remark.[6]

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[6] Cook's protocol violation did not become known until the pre-trial discovery in this case, nearly four years after Sheppard

Sheppard has never denied that she believes in the equality of women, and the fact that she was one of the first women to apply to the Texas Rangers suggests that she does believe that women can and should serve in historically-male positions. The record below does not show, however, that Sheppard ever engaged in any free speech activity of either a public or a private nature or that any committee member relied upon or even heard Cook's "woman's libber" comment and impermissibly considered that comment to Sheppard's detriment.

II. *Course of Proceedings and Disposition Below*

Sheppard brought this lawsuit against the Texas Department of Public Safety ("TDPS") and Cook claiming under 42 U.S.C. § 1983, *inter alia*, the violation of her First Amendment rights. Cook filed a motion to dismiss and a motion for summary judgment on the basis of qualified immunity. The district court denied both of Cook's motions, determining that Sheppard produced sufficient evidence to establish a genuine issue of material fact concerning her First Amendment claim. Cook now appeals the lower court's denial of his motion to dismiss and for summary judgment.

DISCUSSION

I. *The Exercise of Appellate Jurisdiction*

Before reaching the merits of this case, we must first satisfy ourselves that the appeal is properly before us. Sheppard

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was rejected. Mary Ann Courter ("Courter"), the Director of Personnel for the TDPS in 1993, stated in her deposition that, had she known of this violation at the time, the interview process would have been halted and the problem rectified before any individuals had been selected.

would have us avoid a discussion of the merits of Cook's appeal by finding that the appeal concerns the sufficiency of the evidence surrounding Sheppard's claim rather than the determination of an issue of law. We are unpersuaded by this argument and thus conclude that we possess jurisdiction to accept this appeal.

The denial of Cook's motions to dismiss and for summary judgment, and the district court's refusal to accept his defense of qualified immunity, were based on judgments of law. Appellate jurisdiction is proper under the collateral order doctrine where the district court's ruling was based on an issue of law. See 28 U.S.C. § 1291; Mitchell v. Forsyth, 472 U.S. 511, 524-25 (1985). An order is purely legal where it concerns only the application of established legal principles to a given set of facts. See Johnson v. Jones, 515 U.S. 304, 313-14 (1995). An order is not "legal" where it resolves a fact-related dispute of "evidence sufficiency." Id. Here, the legal principle is the objective reasonableness of an official's conduct under clearly-established law, the qualified immunity doctrine.

In an earlier case involving the same issue--appeal of a denial of qualified immunity--we held that the collateral order doctrine permits an interlocutory appeal in circumstances such as these, even though we normally would not hear an appeal from a denial of summary judgment. See Wren v. Towe, 130 F.3d 1154, 1157 (5th Cir.1997). Even the existence of disputed issues of material fact does not preclude review where the district court's actions were based in law. See Hare v. City of Corinth, 135 F.3d 320, 324 (5th Cir.1998); Wren, 130 F.3d at 1157. Indeed, "Johnson permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for the purposes of summary judgment met the Harlow [v. Fitzgerald, 457 U.S. 800 (1982)] standard of objective legal reasonableness."

Wren, 130 F.3d at 1157 (quoting Behrens v. Pelletier, 516 U.S. 299, 313 (1996)) (internal quotation omitted); see also Coleman v. Houston Indep. Sch. Dist., 113 F.3d 528, 531 (5th Cir.1997).

We are satisfied that the district court's action in this case was based in law; taking this appeal comports with our prior rulings in this area and with the accepted understanding of the collateral order doctrine, and we thus recognize our jurisdiction.

II. *The District Court's Order*

On September 22, 1997, the district court entered an order denying Cook's motions for summary judgment and to dismiss. It is not clear from the face of the order whether the district judge based his decision on Rule 12(b)(6) or Rule 56, and, because the basis of his decision is of some import in determining this appeal, we thus pause to consider the question.

Pursuant to our review of the record in this case, we are persuaded that the district court issued its order on the basis of Rule 56. To reach this conclusion, unfortunately, we had "to undertake a cumbersome review of the record to determine what facts the district court ... likely assumed," Johnson, 515 U.S. at 319 because the district court did not explicitly name the type of order issued. The district court used terminology normally associated with summary judgment motions and motions to dismiss interchangeably throughout the opinion--at one point observing that Defendant was "essentially argu[ing] that Plaintiff Lisa Shepard's (sic) first amendment cause of action should be dismissed against the defendants based upon Eleventh Amendment immunity ... and qualified immunity," Order of September 22, 1997, at 1-2, but then later referring to the sufficiency of Plaintiff's "summary

judgment evidence" in determining whether the claims should be "dismissed." Id. at 3.

After carefully reviewing the record, we are persuaded that, in denying the motions, the district court considered information beyond the pleadings, commenting as he did that Plaintiff's "summary judgment evidence" was "sufficient ... to establish a genuine issue of fact concerning her first amendment claim against Cook." Id. We thus consider this appeal as protesting the denial of summary judgment.

III. *Standard of Review*

We exercise de novo review of the grant of a summary judgment.[7] See Wenner v. Texas Lottery Comm'n, 123 F.3d 321, 324 (5th Cir.1997). Summary judgment shall be entered in favor of the moving party if the record, taken as a whole, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute is "genuine" where a reasonable jury could return a verdict for the nonmoving party. See Crowe v. Henry, 115 F.3d 294, 296 (5th Cir.1997). If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

IV. *The First Amendment Claims*[8]

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[7] While we normally do not review the denial of summary judgment on interlocutory appeal, the collateral order doctrine supports review in this case. See supra, part I.

[8] It is worth pause to remember that Sheppard's claim on appeal is hers only and is for First Amendment violations. She does not allege gender discrimination.

To establish a § 1983 claim of retaliation for the exercise of free speech activities, a plaintiff must prove that (1) the defendant was acting under color of state law; (2) the plaintiff's speech activities were protected under the First Amendment; and (3) the plaintiff's exercise of her protected right was a substantial or motivating factor in the defendant's actions. See Pierce v. Texas Dep't of Criminal Justice, Institutional Division, 37 F.3d 1146, 1149 (5th Cir.1994). Another aspect of the test, which should go without saying but which is central to the case at bar, is that the plaintiff actually spoke or otherwise engaged in speech activities recognized by our First Amendment jurisprudence.

Cook argues that because Sheppard did not "speak out" on issues of public concern, she has no First Amendment claim. He reasons that, even if he thought Sheppard were a "woman's libber," he maintained this belief not because of anything Sheppard ever said, or because of any groups to which she belonged, but because of her comportment or for other non-speech reasons. As such, he contends, his decision to undermine her candidacy did not violate any of Sheppard's First Amendment rights, and he should be entitled to qualified immunity. [9]

Although Cook's contention that Sheppard never verbally espoused feminist ideals or advertised her membership in

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[9] As we note below, we need not reach the qualified immunity question presented by Cook to decide this case. For the sake of completeness, we simply note that, "[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Wilson v. Layne, --- U.S. ---, ---, --- S.Ct. ---, 1999 WL 320817, *4 (1999).

feminist political organizations is seductive, we do not dismiss out of hand Sheppard's claim that she was subjected to retaliation for First Amendment activities. "Speech," as we have come to understand that word when used in our First Amendment jurisprudence, extends to many activities that are by their very nature non-verbal: an artist's canvas, a musician's instrumental composition, and a protester's silent picket of an offending entity are all examples of protected, non-verbal "speech." See, e.g., National Endowment for the Arts v. Finley, 524 U.S. 569,--, 118 S.Ct. 2168, 2175 (1998) (accepting as a first principle that "artistic speech" qualifies for First Amendment protection); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (finding constitutional non-verbal "[d]isplays containing abusive invective"); see also Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 790, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (Scalia, J., concurring in part and dissenting in part) (listing as forms of persuasive speech "singing, chanting, praying, shouting, the playing of music ... from handheld boom boxes, speeches, peaceful picketing, communication of familiar political messages, [and] handbilling"). Requiring Sheppard verbally to espouse her political views in the workplace in order to receive the protection of the First Amendment would constrain us in a way that we deem undesirable.

Indeed, the Supreme Court has never required that an individual "speak out" in order to find shelter under the First Amendment. Where lower-level government employees have been punished because of their political beliefs and associations, the Court has held that their First Amendment rights were violated. See Rutan v. Republican Party of Illinois, 497 U.S. 62 (1989) (sic); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). In each of those cases, the plaintiffs suffered adverse consequences not because of anything they said, but because they were not members of a particular political party or organization. The

Court found that "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance;" they must merely show that they were "discharged because they were not affiliated with or sponsored by" a particular party. Branti, 445 U.S. at 517. Following the same logic, if an employee is discharged *because* of her affiliation with a party, she also would be protected.[10] In either case, the affected individual "will feel a significant obligation to support political positions held by [her] superiors, and to refrain from acting on the political views [she] actually held, in order to progress up the career ladder." Rutan, 497 U.S. at 76.

Where a government employee has engaged in speech--either verbally or through such an association--we apply the balancing test that we enunciated in Click v. Copeland, 970 F.2d 106 (5th Cir.1992). In Click, we concluded that a court must balance an employee's First Amendment rights with the employer's right to loyal and efficient service. Where no "countervailing considerations appear[ ] against the employees' right to believe as they chose," id. at 112, the employee's First Amendment rights should be given full weight.

Cook argues that, if we deem Sheppard's belief to constitute speech, she would nonetheless not merit protection because advocating gender equality is not a matter of public concern. Cf. Click, 970 F.2d at 112 (listing as a component of the balance whether the employee's speech involved a matter of public concern). While one could debate whether an

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[10] Employees who are denied promotions, transferred, or not rehired after layoffs because of their political affiliations are also protected under this line of cases. See Rutan, 497 U.S. at 72.

individual's belief in the equality of women and men is a matter of public concern, we are not called upon to decide this question because of the lack of record evidence that Sheppard expressed her views on this issue one way or the other.

Even assuming that the residue of the Click balancing test favored a finding that Sheppard engaged in speech activities, it is an understatement to say that her claim does not fall within an easily-cognizable free-speech paradigm. By never saying *anything*, Sheppard may only rely on the Supreme Court's political association jurisprudence to anchor her First Amendment claim. Unfortunately for her case, this foothold is decidedly narrow because Sheppard never produced *any* evidence showing an outward sign of her membership in a feminist organization or support--even tacit support--of a feminist agenda.[11] Notwithstanding the fact that Cook

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[11] This case leaves us with a sense of great consternation, largely because our repeated search of the record failed to disclose anything but a murky link between Sheppard and feminist causes or organizations. What Sheppard lacked was an indicia of *support* for feminism beyond simply wanting to be a Texas Ranger. Had she demonstrated that support in *any* outward way, we might have found, as a sister circuit did in a similar case, that a supportive association which is nonetheless completely silent is entitled to First Amendment protection. See Hatcher v. Board of Public Education, 809 F.2d 1546, 1557 (11th Cir.1987).

In Hatcher, the Eleventh Circuit addressed the complaint of an elementary school principal who was demoted by her school board. The principal discreetly attended protests of the board's decision to close her school and appeared in public with the families of some of the protest leaders but never expressed verbal animosity for the school board or support for the parents. See id. In that case, silent presence qualified as speech because it was interpreted in the community as support for the protest. More importantly, the principal's association served as the catalyst for the school board's decision to retaliate against her.

thought she was a member of a political organization that he disdained and that Sheppard never denied these political beliefs, we cannot simply allow the case to proceed past summary judgment on the theory that Cook's actions on their face were an attempt to violate Sheppard's First Amendment rights. Cook's bad motive alone is insufficient under our case law to establish a First Amendment claim. See Jones v. Collins, 132 F.3d 1048, 1052-55 (5th Cir.1998).

Based on our independent review, then, we are inclined to a different outcome than our learned colleague below. We sympathize with the district court's struggle through the maze of this close case and its search for a clarion dispute over material facts, but we ultimately believe that the case cannot proceed because Sheppard never placed into evidence *any* set of facts that would allow a reasonable jury to conclude that Cook violated her First Amendment rights. Instead, she has attempted to weave a garment of whole cloth from disparate strands, but she has succeeded in fashioning only a piecemeal claim.

Sheppard's argument to this court had threshold appeal because the evidence is *overwhelming* that Cook acted unreasonably in deliberately rigging the selection process. Cook even willingly admits that he made the offensive statements at issue. [12] Although we readily note our disdain

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Sheppard cannot point to a single event or association which might have led Cook or other members of the Rangers to associate her with feminist organizations, and it is on that ground that her claim ultimately founders.

12 Justice Holmes once observed that "[a] word is not a crystal, transparent and unchanged, [but] it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). Cook's referring to Sheppard as "independent," "opinionated," and a "woman's libber"

for Cook's improper actions, we nevertheless conclude that Sheppard presented inadequate proof for her claim that she engaged in speech or other activities entitled to protection under the First Amendment. Consequently, her case cannot proceed under our established First Amendment jurisprudence, and we need not reach the qualified immunity question presented had we found otherwise.

CONCLUSION

For the foregoing reasons, we conclude that Sheppard has not presented enough evidence to survive summary judgment, and that Cook's motion was therefore improvidently denied by the district court. We therefore REVERSE the judgment of the district court and RENDER judgment for Cook.

REVERSED AND RENDERED.

EMILIO M. GARZA, Circuit Judge, specially concurring:

I concur, but write separately to elaborate on the majority's statement that "[e]ven the existence of disputed issues of material fact does not preclude review where the district court's actions were based in law."[13] The statement simply

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signified insulting remarks lobbed in the direction of a woman who was seeking to change 150 years of chauvinism. From another's lips, the phrase might have been a compliment instead of solecism, referring instead to her steadfastness and stony courage in the face of obstacles.

13 The majority's statement re-affirms what some of our earlier panels have said. *See Hare v. City of Corinth, Miss.*, 135 F.3d 320, 324 (5th Cir.1998) ("The denial of summary judgment on qualified immunity is, of course, immediately appealable, even when a genuine issue of material fact exists, when the order determines a question of law."); *Wren v. Towe*, 130 F.3d 1154, 1157 (5th Cir.1997) ("A district court's denial of summary judgment is not immune from interlocutory appeal simply

stands for the proposition that we can consider an unsuccessful summary judgment motion that asserts qualified immunity when the defendant takes the genuine issues of material fact off the table by accepting the plaintiff's version of the facts and thereby leaves us with nothing to review but legal issues. *See Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996) ("*Johnson [v. Jones*, 515 U.S. 304, 319, 115 S.Ct. 2151, 2159, 132 L.Ed.2d 238, (1995),] permits [the defendant] ... to 'claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of objective reasonableness"); *see also Colston v. Barnhart*, 146 F.3d 282, 284 (5th Cir.) (discussing *Behrens*) (explaining the difference between "genuineness" and "materiality" in the context of qualified immunity), *cert. denied*, --- U.S. ----, 119 S.Ct. 618, 142 L.Ed.2d 557 (1998); *Coleman v. Houston Independent School District*, 113 F.3d 528, 536 (5th Cir.1997) (Emilio M. Garza, J., specially concurring) (approving of the grant of summary judgment based on qualified immunity because the factual dispute concerned an immaterial issue).

Accordingly, I concur.

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because the denial rested on the fact that a dispute over material fact issues exists."), *cert. denied*, --- U.S. ----, 119 S.Ct. 51, 142 L.Ed.2d 40 (1998); *Naylor v. State of La., Department of Corrections*, 123 F.3d 855, 857 (5th Cir.1997) ("to the extent that a district court order denying qualified immunity determines an issue of law, such an order is appealable in spite of the existence of genuine issues of material fact"); *Coleman v. Houston Independent School District*, 113 F.3d 528, 531 (5th Cir.1997) ("Insofar as the district court order determines a question of law, ... the denial of qualified immunity is appealable, notwithstanding the existence of a genuine issue of material fact.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHERYL STEADMAN	§	
ET AL.	§	
Plaintiffs,	§	
	§	**CIVIL ACTION**
	§	**NO. 95-5700**
v.	§	
	§	
TEXAS DEPT. OF	§	
PUBLIC SAFETY	§	
ET AL.	§	
Defendants.	§	

Order

Pending before the Court are the following motions: Motion for Summary Judgment (Document #145) filed by defendants Texas Department of Public Safety, Captain Maurice Cook, Colonel James, R. Wilson, Lt. Robert Madeira, Capt. W. D. Vickers, and Ronald Krist (collectively referred to as "the defendants"); the Motion for Leave to File Motion to Dismiss, Motion for Summary Judgment on the Basis of Qualified Immunity and Statute of Limitations, Reopen Discovery and Continue Trial Term (Document #146) filed by the defendants, the Motion to Dismiss on the Basis of Qualified Immunity (Document #147) filed by Defendant Captain Maurice Cook ("Cook"), and Supplemental Motion for Summary Judgment on Immunity Grounds (Document #156) filed by defendants DPS, Cook and Wilson.

The above referenced motions essentially argue that Plaintiff Lisa Sheppard's ("Sheppard") first amendment cause of action should be dismissed against the defendants based upon Eleventh Amendment Immunity, as concerns DPS, and qualified immunity, concerning the individual defendants Cook and Wilson. In addition, the defendants argue that Sheppard's first amendment cause of action was not filed timely and is therefore barred by the statute of limitations. Sheppard concedes that she has no first amendment claim against defendants W. D. Vickers, Robert Madeira, or Ronald Krist. Accordingly, to the extent that defendants' motions seek dismissal of the first amendment claims against Vickers, Madeira, and Krist, they are granted.

Sheppard argues, however, that her first amendment cause of action survives summary judgment with respect to DPS, Wilson, and Cook. Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Initially, the movant bears the burden of demonstrating to the Court that there is an absence of a genuine issue of material fact. Id, at 323. The burden then shifts to the party who bears the burden of proof on the claims on which summary judgment is sought, to present evidence beyond the pleadings to show there is a genuine issue for trial. Id.; see also, Washington v. Armstrong World Indus., 839 F.d. 1121, 1122-23 (5th Cir. 1988).

DPS argues that Sheppard's first amendment claims against it should be dismissed based on its sovereign immunity under the eleventh amendment to the United States Constitution. Sheppard responds that because she is seeking prospective injunctive relief against DPS, versus monetary damages, it cannot claim eleventh amendment immunity.

Sheppard further argues that there is a material issue of fact as to whether the alleged violations in this case occurred as a result of an official custom or policy, via the acts of DPS and Wilson, in allowing Cook "to run" the Texas Rangers. While Sheppard may be correct that absolute immunity does not shield state actors from claims seeking prospective, injunctive relief, a plaintiff nevertheless is required to establish that there is a genuine issue of material fact as to each element of her claim concerning each defendant. Sheppard however, provides no summary judgment material to support her claim that DPS and Wilson "allowed a sexist, biased Senior Ranger Captain to run the Texas Rangers, unfettered, for several years." See Lisa Shepard's Response to Defendants' Motion for Summary Judgment on Defendant's Defenses of Qualified Immunity and Statute of Limitations at 7. Accordingly, the claims against DPS and Wilson also are dismissed.

Sheppard has produced sufficient summary judgment evidence to establish a genuine issue of fact concerning her first amendment claim against Cook. Further, the Court determines that Sheppard's first amendment claim against Cook is not barred by the statute of limitations. As such, Cook's motion to dismiss and motion for summary judgment is denied.

Based on the foregoing, the Court hereby **ORDERS** the following:

(1) The Motion for Summary Judgment (Document #145) is **GRANTED** in part and **DENIED** in part. Sheppard's first amendment claim is dismissed as to all defendants except Cook;

(2) The Motion for Leave to File Motion to Dismiss, Motion for Summary Judgment on the Basis of Qualified Immunity and Statute of Limitations, Reopen Discovery and Continue Trail Term

(Document #146) is **GRANTED**. Discovery shall be extended for 60 days from the date of this order on the limited issue of Sheppard's first amendment cause of action. The trial of this matter shall be continued until the January/February 1998 trial term;

(3) The Motion to Dismiss (Document #147) filed by Cook is **DENIED**; and

(4) The Supplemental Motion for Summary Judgment on Immunity Grounds (Document #156) filed by DPS, Cook, and Wilson is **GRANTED** in part and **DENIED** in part. The claims against DPS and Wilson are dismissed.

The Court further

ORDERS THAT NO FURTHER MOTIONS SHALL BE FILED IN THIS CASE WITHOUT THE PARTIES FIRST OBTAINING LEAVE OF COURT TO FILE.

SIGNED at Houston, Texas, on this 22 day of September, 1996.

/S/_____
DAVID HITTNER
UNITED STATES DISTRICT JUDGE